No. 3681

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

C. HENRY SMITH,
Plaintiff in Error,

vs.

A. O. LINDVIG,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

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I. Statement of the Case.

Defendant* was engaged at San Francisco in the importing and exporting business since 1908. In the latter part of 1913 he conceived the idea of organizing a Norwegian corporation to operate steamships between British Columbia ports, Seattle, San Francisco, Los Angeles, and ports on the coast of Mexico and Central America. After he and local friends had subscribed $75,000 toward the stock of such a corporation, he sent Captain M. O. Rustad to Norway, for the purpose of interesting Norwegian capital. While in Norway Captain Rustad

* For the sake of brevity plaintiff in error is referred to herein as defendant, and defendant in error as plaintiff.

met plaintiff, a large ship-owner. Captain Rustad then cabled defendant asking "if he should connect with Mr. Lindvig and investigate his standing", and defendant cabled him to do so. Thereafter defendant went to Norway, and on June 29, 1914, entered into the following agreement with plaintiff:

> "Mr. A. O. Lindvig, of Christiania, and Mr. C. Henry Smith of San Francisco have this day made the following agreement *with regard to A/S Baja California,* a steamship line to operate steamers between Mexican and Central American Ports and the West Coast of the United States as well as British Columbia.
>
> For the steamship line as aforementioned Mr. Smith is to act as general agent with authority to appoint subagents, when required, for securing cargo northbound and southbound, fix charters, when sufficient inducements offer, as well make all necessary arrangements for docking and clearing of the steamer at the respective ports of call.
>
> It being also understood that the general agent or subagents are to make contracts, at the lowest competitive rates, for tallying and stevedoring. On all freight earned a commission of five per cent is to be allowed Mr. Smith, including any allowance or allowances made to subagents—Besides this remuneration an allowance per steamer is to be made to cover incidentals, stamps and other disbursements and for travelling expenses, as required, subject to special agreement.
>
> *In the event any steamer or steamers of the A/S Baja California* are fixed by Mr. Smith for other voyages than as hereinbefore mentioned, or on time charter, a commission of 2½ per cent on the freight earned is allowed.

> This agreement is to remain in force for a period of three years, provided the line referred to above is maintained so long.
>
> Christiania, 29th. June, 1914.
>
> (Sgd.) A. O. Lindvig,
> (Sgd.) C. Henry Smith."
>
> ("A/S" stands for corporation.)
>
> (Record, p. 26.)

Two vessels were built for the company at Sunderland, England. These were named the "Sinaloa" and the "Baja California". The "Sinaloa" arrived at San Francisco in December, 1914, the "Baja California" about a month later. These two steamers were operated by the line during 1915 and 1916. The business increased as the result of defendant's labors in securing cargo, and in the fall of 1916 the "Governor Forbes" was purchased and added to the line (Record, p. 145).

The plaintiff's agency terminated by his resignation on August 1, 1917, but was continued by agreement with defendant until October 1, 1917. The dividends paid by the "Baja California" from the beginning of operations up to October 1, 1917, were very high (Record, p. 202).

Plaintiff authorized defendant to retain remittances to meet installment payments on other steamers built by defendant for plaintiff.

The instant case is one wherein the plaintiff, as principal, disputes the right of defendant, as agent, to retain certain commissions claimed by

defendant for services rendered in contracting for and superintending the construction of steamers, in purchasing one steamer, in salving and repairing another steamer, and in securing cargoes for the steamers of the line.

The complaint claims a sum of money amounting to $70,582.72, but the bill of particulars filed by plaintiff specifies items claimed by plaintiff, amounting to $58,532.72 (Record, pp. 9-10; Appendix to this Brief, pp. 1-2).*

These items, aggregating the sum of $58,532,72, are the following in the chronological order of their occurrence:

(1) *"Regulus":* A charge of $6000.00, for contracting and superintending construction.

This steamer was built on the Oakland Estuary for its owner, Pacific Company, of which plaintiff was managing owner, for a contract price of $450,-000.00, at a time when vessels increased rapidly in value so that, by the time of her completion, she was worth two or three times her contract price. Defendant made the contract for her construction in December, 1915, and thereafter made many trips to the place of her construction and gave much of his time in superintending her construction. She was delivered by the builder in March, 1917. For

* For convenient reference the evidence and assignments of errors relating to $12,050 not specified in the bill of particulars, and the disputed items in the bill of particulars, are included in an appendix to this brief.

these services he charged the plaintiff $6000.00, being a commission of about one and one-fourth per cent of the contract price, a charge which plaintiff thereafter found "in order" (Record, p. 72, and Appendix, pp. 5-11).

(2) *"Romulus":* A charge of $10,000.00 for contracting and superintending construction.

This was a sister ship of the "Regulus", and defendant had been working on the matter of securing a contract since December, 1915, and, on September, 15, 1916, as plaintiff's representative, entered into a contract for the construction of this steamer for $775,000.00. Thereafter defendant spent a considerable amount of his time in going to the Oakland Estuary, where this steamer was being built, and in supervising the building of the steamer in accordance with the plans. The steamer was thereafter commandeered by the United States Government. For the services rendered in connection with this steamer defendant retained the sum of $10,000.00, being approximately one and one-fourth per cent of the contract price (Record, pp. 91-92; Appendix, pp. 25-30).

(3) *"Governor Forbes":* Commission on purchase, $6800.

Defendant made arrangements to buy this steamer in 1916 for $340,000.00, with a two per cent commission. Before the purchase the plaintiff was notified of this commission (Record, pp. 94, 145; Appendix, pp. 30-32).

(4) *"Sinaloa":* A charge of $3165.27 for services in connection with the salving and repairing of the steamer.

Defendant offered to show that the "Sinaloa" went aground in the fog near Cape Blanco, Mendocino County, on June 16, 1916; that plaintiff requested defendant to do everything possible to save her; that defendant immediately went out to the steamer, made contracts for salving her, cooperated with the underwriters, disbursed the funds, and, when she was floated, brought her to San Francisco, there submitted her to competitive bidding for the repairs and afterwards, when the lowest bidder failed to go on with the work, defendant conferred with the United States Shipping Board and arranged for the continuation of the repairs, in order to enable the "Sinaloa" to continue the carrying of nitrate for Dupont de Nemours Company (Record, pp. 105-109; Appendix, pp. 32-43

For these services defendant charged the sum of $3,165.27, which remuneration was allowed in the general average adjustment in connection with the stranding of this steamer (Record, p. 131; Appendix, p. 33).

(5) Commission on contract with Dupont de Nemours Company, amounting to $25,517.80.

Defendant entered into a yearly contract with Dupont de Nemours Company for the carriage of nitrate on the return voyage north of the vessels of the line. The last of these contracts was dated

July 10, 1917, and covered the transportation of 40,000 tons during the year June 1, 1917, to June 1, 1918. The sum of $25,517.80, retained by defendant, is the five per cent commission claimed by him on the freight earned by the Dupont de Nemours contract under the agreement with plaintiff of June 29, 1914 (Record, pp. 110-111; Appendix, pp 43-47

(6) A balance of estimated freight earnings of $5000.00.

This item is the five per cent commission claimed, under the agreement of June 29, 1914, on freight earned through cargo booked prior to October 1, 1917, but not actually loaded on board of vessels until after October 1. 1917 (Record, p. 119; Appendix, pp. 47-48

(7) The commission on the inward freight of "Governor Forbes" $2049.65.

This steamer left Guayaquil in September, 1917, with a cargo of cocoa booked during the period of defendant's agency, but arrived in San Francisco on October 3rd, or 4th, 1917, being a few days later than the termination of defendant's agency. The sum of $2049.65 is five per cent of the freight money claimed as commission under the agreement of June 29, 1914 (Record, p. 123) (Appendix 48-49)

The sum total of the preceding seven items is the sum of $58,532.72 specified in the plaintiff's bill of particulars as "the items * * * upon which this

complaint is based". The prayer of plaintiff's complaint is for $70,582.72. The difference between the amount of the prayer in the complaint and the amount itemized and specified in the bill of particulars is the sum of $12,050.00. Defendant excepted to the bill of particulars on the ground of its insufficiency, but the exception was overruled by the trial court, and defendant went to trial ready to meet the issues raised by plaintiff's bill of particulars, and none others (Record, p. 11).

The trial court directed a verdict in favor of the plaintiff for the amount of $70,582.72, with interest from October 1, 1917. The verdict rendered by the jury, and the judgment entered in favor of the plaintiff, was accordingly in the sum of $77,939.00. The principal sum of the verdict exceeds the amount specifically claimed by plaintiff in his bill of particulars by $12,050.00.

II. The Questions Involved and Errors Relied Upon.

First: Defendant contends that the court erred in directing a verdict in excess of plaintiff's claim by the sum of $12,050, and in entering judgment against defendant on said verdict.

(Assignments No. 22, 23, 24, 25, 46; Appendix, pp. 2-3).

Second: Even on the assumption that the construction of the contract, as adopted by the trial court, is correct, the "Regulus", "Romulus", "Governor Forbes" and "Sinaloa" services, are not matters of law, but matters for the determination of a jury, and it was therefore error to direct a verdict at all.

(Assignments No. 29, 30, 31, 32, 38, 39, 40, 41, 42, 51; Record, pp. 239, 242, 249).

Third: Defendant contends that, under his construction of the contract:

1. The court erred in denying him compensation for his services in contracting for and superintending the construction of the steamer "Regulus".

 (Assignments No. 1, 3, 4, 25, 26, 48, 49; Appendix, pp. 22-25.)

2. The court erred in denying him compensation for his services in contracting for and superintending the construction of the steamer "Romulus".

 (Assignments No. 2, 48, 49; Appendix, pp. 29-30.)

3. The court erred in denying him compensation for his services in connection with the purchase of the steamer "Governor Forbes".

 (Assignments No. 5, 47, 48; Appendix, pp. 31-32.)

4. The court erred in denying him compensation for his services in connection with the salving and repairing of the steamer "Sinaloa".

 (Assignments No. 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21; Appendix, p. 38-43

5. The court erred in denying him compensation for securing cargo under the contract with Dupont de Nemours Company.

 (Assignments No. 33, 34, 35, 36, 43; Appendix, p. 44-47

6. The court erred in denying him compensation on cargo secured for the inward voyage of the steamer "Governor Forbes".

 (Assignments No. 43, 44; Appendix, p. 48.)

7. The court erred in denying him compensation for cargoes secured prior to October 1, 1917, although the freight on said cargo was collected subsequent to said date.

 (Assignments No. 43, 44; Appendix, p. 47.)

III. The Argument.

FIRST: THE FACT THAT THE DIRECTED VERDICT IS IN EXCESS OF PLAINTIFF'S CLAIM BY $12,050, ENTITLES DEFENDANT TO A REVERSAL OF THE JUDGMENT.

1. As to the object and effect of a bill of particulars:

The function of a bill of particulars is to amplify the pleadings so that the claim of the party on whom demand therefor is made may be clearly defined and concisely set forth, to the *end that there may be no question as to what the claim is.*

Pitleman v. Fotheringham, 185 N. Y. S. 385;
Ames v. Bell, 5 Cal. App. 1; 89 Pac. 619.

A bill of particulars *may limit, but not enlarge,* a claim set up in a declaration.

A. O. Anderson Trading Co. v. Brody, 143 App. Div. 681; 184 N. Y. S. 383;
Offner v. Wilke, 208 Ill. App. 463.

The purpose of a bill of particulars is to set forth IN DETAIL and more minutely PRECISE ACTS OR OMISSIONS of defendant which plaintiff claims render him liable.

Forbes v. Benson, 103 A. 228 (R. I.).

A bill of particulars is not a pleading, and it may RESTRICT, but cannot enlarge, THE SCOPE OF RECOVERY PERMISSIBLE UNDER THE DECLARATION.

Cook v. Dade, 158 N. W. 175 (Mich.).

2. **Plaintiff could not prove damages in excess of $58,533.72.**

The office of a bill of particulars is not only to define and limit the issues, but also to apprise the opposing parties of WHAT THEY HAVE TO MEET AT THE TRIAL.

Tompson v. De Visser, 106 Misc. Rep. 165; 175 N. Y. S. 276.

Defendant did not have to meet, at the trial, the apocryphal claim for $12,050.

The object of a bill of particulars is, "of course, to narrow the evidence to the issues framed".

Curtis v. Phelps, 209 Fed. 261.

"The very function of a bill of particulars is to APPRISE the moving party of the ultimate facts UPON WHICH THE OTHER PARTY PROPOSES TO RELY, without furnishing the mode of proof."

O-So-Ezy Mop Co. v. Chemical Co., 230 Fed. 469, 470.

Plaintiff is LIMITED IN HIS DEMAND AND RESTRICTED IN HIS PROOF to the subject-matters SPECIFIED in his bill of particulars.

King v. Rhodes, 47 App. D. C. 316;

Decker v. Lightfoot, 44 App. D. C. 45;

Brown v. Calvert, 34 Kentucky (4 Dana) 219.

"The defendant is only called upon to meet the allegations set out in the bill of particulars, and presumptively he prepares to meet the

items of the bill of particulars AND NOT OTHERS that may be proved against him."

Armour v. Blumenthal, 9 La. App. 707; 72 S. E. 168.

"The effect of furnishing the bill is to *limit the evidence* which the plaintiff may offer in support of his claim."

Chamberlain v. Loewenthal, 138 Cal. 47.

A bill of particulars *may have the effect of a pleading* in so far as it restricts the proof.

Cicotte v. Wayne Co., 44 Mich. 173; 6 N. W. 236.

"A bill of particulars is RESTRICTIVE OF THE RIGHT OF RECOVERY STATED IN A DECLARATION, and it is ERROR to admit proof of a cause of action OR DAMAGES NOT THEREIN SPECIFIED."

Colwell v. Brown, 103 Ill. App. 22.

3. The amount of the judgment recoverable by plaintiff was limited to $58,532.72.

"The bill of particulars limits the proof which plaintiff is entitled to offer and confines it to the subject matter of the items set forth therein, and THUS MAY BE SAID TO WORK A LIMITATION UPON OR AFFECT THE AMOUNT OF THE JUDGMENT TO WHICH THE PLAINTIFF MAY BE ENTITLED."

Frost v. Internat. Rubber Co., 37 R. I. 476; 93 A. 641.

A bill of particulars furnished by the plaintiff to the defendant of the account sued on is to be

regarded as an amplification of the complaint, and FOR THE PURPOSE OF DETERMINING THE PLAINTIFF'S RIGHT OF RECOVERY, or the advisability of evidence in support of the claim, is to be considered as incorporated into the complaint as originally filed.

Millet v. Bradbury, 109 Cal. 170.

Items not included in the bill of particulars cannot be proved.

Ellis v. Crawford, 39 Cal. 523, 528.

The items of the bill of particulars, in the instant case, aggregate $58,532.72. No item not covered by this sum could be proved, nor could any sum not covered by this sum be recovered.

4. The directed verdict for $70,582.72 should be reversed.

In *Palmer v. Reynolds,* 3 Cal. 396, it was held that a judgment on a verdict for damages greater than the demand in the declaration MUST BE REVERSED, and the cause remanded.

As the effect of the bill of particulars is to incorporate the items into the complaint and to limit the complaint, the judgment in the instant case is greater than the demand in the declaration and should be reversed.

Where the largest amount that could be allowed under the pleadings and evidence is MATERIALLY LESS than that found by the judge, the judgment will be reversed.

Western Contr. Ass'n v. Rettiger, 9 Kan. A. 885; 61 P. 313.

In an action on several notes, a note for which judgment was entered was *not included in the bill,* nor specifically mentioned in the list appended thereto. It was held that a judgment including the amount of this note must be reversed, as being in excess of the amount claimed in the pleadings.

Hart v. Chemical National Bank, 27 So. 926 (Miss.)

In *Houston Ry. Co. v. Shutts,* 90 S. W. 506 (Tex.) it was held that a verdict in excess of the amount named in the pleadings constitutes REVERSIBLE ERROR.

In *Morrisett v. Wood,* 128 Ala. 505; 30 So. 630, the trial court had charged the jury that they were not confined to proof of the items shown by a bill of particulars furnished by plaintiff to defendant before the trial. *Held:* Reversible error.

The court said:

> "The office of a bill of particulars under the statute is to amplify the pleadings, and to prevent surprise of the defendant by furnishing him with a statement of matters against which he is called to defend. The bill, when furnished, *limits the generality of the pleading, and its effect is, and should be, to limit the proof to the particulars stated therein. . . .*"
>
> "The plaintiff will not be permitted to recover under the common count *or any cause of action not included in the bill of particulars filed* with the declaration, and where he files a bill of particulars, *he will not be allowed in the proof to go beyond them. . . .*"

> "The proofs should have been limited to the bill of particulars as to the services rendered, and the value of the particular services when shown. The court therefore erred in the admission of evidence, in not limiting the proof to the plaintiff's bill of particulars."

These authorities show conclusively that plaintiff, under his pleadings, was precluded from showing that he had any right to recover more than $58,-532.72; that the directed verdict for $70,582.72 was excessive, and that the judgment entered thereupon should be reversed.

SECOND: EVEN ON THE ASSUMPTION THAT THE CONSTRUCTION OF THE CONTRACT, AS ADOPTED BY THE COURT, IS CORRECT, THE "REGULUS", "ROMULUS", "GOVERNOR FORBES" AND "SINALOA" SERVICES, ARE NOT MATTERS OF LAW, BUT MATTERS FOR THE DETERMINATION OF A JURY.

None of these services are within the express duties enumerated in the agreement, under which defendant was

(1) to act as general agent with authority to appoint sub-agents, when required, for securing cargo northbound and southbound;

(2) to fix charters when sufficient inducements offer;

(3) to make all necessary arrangements for docking and clearing of the steamer at the respective ports of call;

(4) to make contracts, at the lowest competitive rates, for tallying and stevedoring (by himself or sub-agents).

The conclusion that defendant was to build, and repair steamers under this agreement can be justified only by striking out all the sixty-one words following after the words "general agent", leaving the mutilated contract in the form:

> *"For the steamship line as aforementioned Mr. Smith is to act as general agent."*

Assuming, for the sake of the argument, that this mutilation of the contract is legally possible, the question remaining to be settled would be:

What are the duties of a general agent for a steamship line? We respectfully submit that this question is not answerable by any rule of law; that the duties of the general agent of one steamship line are different from those of a general agent of a steamship line differently situated; that the implied duties of the general agent of any particular steamship line depend upon all the circumstances surrounding that line, including customs and usages; and that reasonable men might well differ in finding, what duties are within, and what duties without, the customary duties of a general agent of a steamship line.

In other words, the question, what services were to be performed by defendant as the general agent of the steamship line (in the absence of specific agreement) within this agreed compensation, as

such, is a question for the determination of a jury. That the matters in issue with reference to defendant's services in contracting for, constructing, purchasing and salving ships were matters for determination by a jury, is shown by the decision of the Supreme Court of California in the case of:

Brown v. Crown Gold Milling Co., 150 Cal. 389, in which the Supreme Court used the following language:

> "In the next instruction complained of the Court told the jury, in effect, that if they believed from the evidence that the plaintiff was employed by defendant for the sole purpose of exploiting a certain specific machine—that is, explaining it and its mode of operation, and the results produced by it, to persons inquiring concerning it, and meeting arguments and objections made against it—and also find from the evidence that these services were to be rendered at a specified sum per week, which was paid, still if they found that during the term of his employment plaintiff, at the request of defendant, rendered certain services outside the sphere of his employment, he was entitled to recover a reasonable compensation for such services, although there was no express agreement to pay therefor.
>
> No exception can be taken to the instruction as embodying a correct principle of law.
>
> It is claimed, however, by appellant, that it had no application to the facts in the case at bar, it being insisted that the extra services which plaintiff claims to have performed were all in connection with the operation and success of the machine relative to which he was employed. *But whether these services which were claimed to have been extra were so, or were in the line*

> *of plaintiff's employment, were matters for determination by a jury,* and their verdict must be deemed conclusive on the subject."

In *Pittsburgh Railroad Company v. Henderson,* 36 N. E. 376 (Ind. 1894) the plaintiff was employed by the defendant as general ticket and freight agent at a railroad station. He sued for extra compensation for carrying mail for the defendant between the post office and the railroad station. The defendant contended, that, as to his right to extra compensation, the intent of the parties must be gathered from the contract itself, and that, as a matter of law, his employment covered his compensation for the service of carrying the mail.

The court, in its opinion, gave full recognition to the rule set out in *Wood, Master and Servant:*

> "One employed at a regular salary to perform certain duties or labor is not entitled to additional compensation on account of additional or increased labor in the same line of employment, in the absence of an express promise to pay for such additional labor;"

but the court said:

> "We are unable to conceive how it can be held *as a matter of law* that the employment as ticket and freight agent includes the duty of carrying the mail between the station and the post office.
>
> If carrying the mail from the depot to the post office was not a part of the service required by appellee in connection with his employment as ticket and freight agent, then he may recover."

In *Reiser v. Staufer,* 41 N. W. 706 (Wis. 1889), the plaintiff was employed, under a written contract, to take entire charge of and to keep in order, all engines, boilers, pumps and all other machinery in defendant's saw mill, for a certain sum per year. During the year he superintended the construction of a well, pump and water works for the protection of the lumber yard, adjoining the saw mill, against fire.

The court held:

(1) This work was not in terms included in the contract.

(2) The jury was justified, on conflicting evidence, in finding that there was an implied contract to pay for plaintiff's work and materials at their reasonable price.

In *Leach v. Railroad Company,* 86 Mo. 27; 56 Am. Rep. 408, an agent to settle claims against the railroad had a contract for services for a fixed compensation. During said employment he made claims against the railroad for services as a notary.

The court held:

> "Whether these notarial services were distinct from and independent of, and not embraced in the plaintiff's contract of service, was a question of fact, to be determined, under proper instructions, from a consideration of all competent evidence that might be offered thereon by the parties."

In *Standard Plunger Elevator Co. v. Brumley,* 149 Fed. 184, the Circuit Court of Appeals for the Third Circuit held that:

> "Where in an action for agent's services in the sale of certain machinery, plaintiffs claim for additional services rendered to defendant in the performance of certain contracts outside their general oral contract of agency, whether such extra services were incident to such contract, or whether they were independent thereof, was for a jury."

In the instant case, the agreement was in writing and specified the duties to be performed by defendant, all of which duties refer to the operation of steamers already built and exclude, impliedly, the duty to furnish or build the new steamers. The specifically enumerated duties of defendant, referring to the securing of cargoes for the steamers of the line and the doing of acts related to such cargoes, are sufficient, in our opinion, to have entitled defendant to an instruction to the jury that, as a matter of law, defendant had no duty to purchase or construct new steamers for the line without compensation; but at this point we contend that, after striking the definition of defendant's duties from the agreement, and assuming the contract to impose upon defendant all the duties implied in a general agent appointed for the operation of the steamship line, still the question, whether the services of purchasing and building new steamers were incident to such a general contract of agency or not, was primarily a question for the jury.

What is usual and necessary for an agent to do in connection with the business in question is a question for the jury.

Hartford & N. Y. Transp. Co. v. Plymer, 120 Fed. 624 (C. C. A., 2nd Circ.).

The mere fact that one is found to be a general agent justifies neither court nor jury in guessing that given acts are within the scope of his authority or duty.

Gore v. Canada Life Ass. Co., 119 Mich. 136.

THIRD: THE CONSTRUCTION OF THE AGREEMENT IN CONNECTION WITH OUTSIDE SERVICES: DEFENDANT IS ENTITLED TO REASONABLE COMPENSATION THEREFOR.

A. Analysis of the scope of defendant's duties.

1. The agreement is with regard to A/S Baja California.

2. The Baja California was a steamship line to operate between Mexican and Central American ports, and the West Coast of the United States as well as British Columbia.

3. For this steamship line defendant was to perform services as follows:

(a) "act as general agent with authority to appoint subagents, when required, for securing cargo northbound and southbound".

(b) to "fix charters when sufficient inducements offer".

(c) to "make all necessary arrangements for docking and clearing of the steamers at the respective ports of call".

(d) "make contracts, at the lowest competitive rates, for tallying and stevedoring".

"I have nothing to do with the operation of the vessels, their outfitting, or their tackle, furniture or repairs, or with the appointment of their masters, or the employment of their crews, or anything to do with the furnishing of provisions and stores, or with the preparation of proper certificates or surveys, or their insurance or management." (Testimony of Defendant, Record, p. 125.)

B. Principles of construction:

"The terms 'general agent' and 'special agent' are *relative*. An agent may have power to act for his principal in *all* matters. He is then strictly a 'general agent'. He may have power to act for him in particular matters. He is then a 'special agent'. But within the scope of such particular matters his powers may be general, and with reference thereto he is a 'general agent'."

Springfield Eng. & Thresher Co. v. Kennedy, 34 N. E. 856, 859 (Ind.).

C. Application to the instant case:

First: Defendant was not strictly a "general agent" for the steamship line. He had power to act for the steamship line, as a general agent, and the correlative duties of performing serv-

ices for it, only in relation to the securing of cargoes for the steamers, northbound and southbound, with the understanding that he, or the sub-agents, were to make contracts, at the lowest competitive rates, for tallying and stevedoring the cargoes. Within the scope of these particular matters his powers were general, and with reference to these particular matters only he was a "general agent". These matters referred to cargoes and contracts connected with cargoes. The services which he was to perform for the agreed compensation were all connected with the making of contracts relative to the securing, tallying and stevedoring of cargoes. All these services presupposed the existence of steamers ready to be used for the carrying of cargoes and were disconnected from the securing and operating of these steamers. The business of providing the ships, of manning and operating them was the business of plaintiff to be performed by himself or other agents, f. i. the masters of the steamers.

The additional special services to be performed by defendant, viz., "fixing charters when sufficient inducements offer" and "making all necessary arrangements for docking and clearing of the steamers at the respective ports of call"—in so far as they were services connected with the steamers of the line, also presuppose the providing of the steamers by the plaintiff and their operation by other

agents and are so clearly specific that they exclude any duty, on the part of defendant, of performing the service of purchasing, constructing or salving steamers for the plaintiff.

The foregoing are all the services which defendant was, by the agreement, to render for the agreed compensation. It follows that all other services, and in particular services rendered in procuring and maintaining the ships which were to carry the cargoes secured by defendant, were extra services.

Second: All services performed by defendant, which are *not* conditioned upon the previous existence of steamers ready for operation and earning freight, are *not* within the scope of defendant's duties under the contract, but are outside services for which he is entitled to compensation on a quantum meruit basis.

Third: Services in connection with the acquiring, building, managing, salving and repairing of any ships were not transactions within the scope of the duties contemplated by the agreement.

Fourth: In particular the services connected with the building of the steamers "Regulus" and "Romulus" were not services covered by the agreement, for the reasons that:

(a) these services were not "with regard to A/S Baja California". The "Regulus" was never used as a steamer of the Baja

California Line, running to "Mexican and Central American ports". In his "Report for the Year 1917, to the stockholders, plaintiff, the managing owner, says:

> "The ship, which was named the "Regulus", immediately commenced loading general merchandise in San Francisco, bound for *South American ports, as far as Valparaiso.* It brought back a full cargo of nitrate, and has since been running regularly between Puget Sound, San Francisco, and *South America.*"

(b) these services were not within the express or implied duties of defendant under the agreement, but were outside services to be reasonably compensated for.

Fifth: The services performed in connection with the purchase of the "Governor Forbes" were not within the express or implied duties of defendant under the agreement, but were outside services to be reasonably compensated for.

Sixth: The services performed in connection with the salving and repairing the "Sinaloa" were not within the express or implied duties of defendant under the agreement, but were outside services to be reasonably compensated for.

D. The construction adopted by the trial court strikes out of the agreement the specification of defendant's duties:

Only by striking 61 words out of the agreement does it become even plausible to make out of defendant a kind of general manager of the line, au-

thorized and obligated to build and purchase new steamers, and to salve steamers on the rocks. These 61 words are the words following directly after the words "as general agent" in the second paragraph of the agreement.

To produce this result it is necessary, not only to eliminate the 61 words mentioned, but also to mutilate the sentence in which the words "as general agent" occur by changing it from the form used in the agreement, viz.:

> "For the steamship line as aforementioned Mr. Smith is to act as general agent with authority to appoint subagents, when required, for securing cargo northbound and southbound"

to the following form:

> "For the steamship line as aforementioned Mr. Smith is to act as general agent."

Only by this process of amputation could defendant be converted from a general freight agent with limited powers and no control over the steamers into a general manager of the line with the power and duty to add to the steamers. No argument is required to show that the court was not justified in making a new contract for the parties by eliminating these words and disregarding their plain meaning.

E. The practical construction placed upon the agreement by the plaintiff himself confirms the contention that defendant was to receive extra compensation for the services:

1. "Romulus": Plaintiff recognized defendant's right to the commission of $10,000 for services rendered in the construction of the "Romulus" by making this sum an item of the price charged to the United States when the steamer was commandeered. It makes no difference, whether plaintiff has already received the $10,000 or is to receive them in the future; for the fact remains that, by making the charge, he recognized its propriety and lawfulness (Record, p. 93; Appendix, p. 28). In the event that he has already received this sum from the United States, the effect of the present judgment would be the unjust consequence that he would receive double payment, whereas defendant, who performed the service for which plaintiff charged, would receive nothing. Plaintiff has impliedly admitted that defendant's charge is just and should be estopped from now claiming that defendant has no right to a payment which he, plaintiff himself, claims the right to collect from the United States.

2. "Regulus": Plaintiff recognized defendant's right to the commission of $6000 for the services rendered in the construction of the "Regulus" by including this item in his report for the year 1917, to Pacific, Ltd., the corporation which owned this steamer. Having allowed this charge against the stockholders, plaintiff should now be estopped from

claiming that defendant had no right to make the charge which he, plaintiff, recognized as a proper charge against the stockholders (Record, pp. 79-81; Appendix, p. 10).

Furthermore: In a letter dated August 29, 1917, plaintiff wrote to defendant (referring to the account of June 1, 1917, containing the item: "Renumeration a/c Building S. S. Regulus, $6000"). "I have gone through your accounts enclosed in your letter of June 1st, and find same in order." (Record, pp. 71-72.)

F. Defendant was entitled to reasonable compensation for the additional services.

In *U. S. Mortgage Co. v. Henderson,* 111 Ind. 24; 12 N. E. 88, an attorney was employed as agent to negotiate and collect loans. Among others, he performed services in foreclosing mortgages and collecting moneys by legal proceedings; looking after repairs and caring for properties bought in at foreclosure proceedings; superintending repairs and taking general supervision of properties.

It was held:

1. That these were "services quite different from those comprised by the contract of agency".
2. That the principal was liable to pay a just and fair compensation.

The case of *Standard Plunger Elevator Co. v. Brumley,* supra, recognizes the principle that the additional services rendered by the agent may be

so independent of the services originally contracted for as to entitle him to extra compensation on a *quantum meruit* basis.

In *Ridley v. Sexton*, 18 Grant (U. C.) 580, the principal, engaged in the lumber business, engaged an agent and agreed to pay him a specified commission on all timber manufactured by the agent for the principal, which rate "included purchasing, superintending the making, and attending to the shipping of the same". The agent bought a quantity of timber for his principal, which was not manufactured under the superintendence of the agent.

It was *held* that he was entitled to a *reasonable compensation* for this service. The court said:

> "Notwithstanding he may be general agent for the subject matter covered by his contract, if he performs services for his principal, just exactly as he would perform the service for some one else, of value, and there arises under the facts an implication that it was to be compensated, there is not any reason under the law, why he should not receive that compensation."

In the instant case defendant was general agent for securing cargo only. Plaintiff was the general manager. The matter of the purchasing, constructing, repairing, and salving of the steamers was his business. The masters of the vessels were agents for matters connected with the navigation of the steamers.

The services referring to the "Regulus", "Romulus", "Governor Forbes" and "Sinaloa", were not, in their nature, of the same character as the services incident to the authority and duty of defendant under the contract.

There was, therefore, an implied contract to pay to defendant, in addition to the commission on freight, the reasonable value of the additional services rendered by him.

G. Under its own construction of the contract the court erred in excluding evidence of a legal custom entitling defendant, as general agent of the line, to reasonable compensation, for the "Romulus", "Regulus", "Governor Forbes" and "Sinaloa" services.

Defendant offered to prove a general and uniform custom to compensate general agents of steamship lines for services rendered in connection with vessels (such as the "Regulus", "Romulus" and "Governor Forbes" services), and in particular in connection with salvage services ("Sinaloa"), but the court sustained plaintiff's objections to all of defendant's questions bearing upon such custom and excluded all evidence thereof (Assignments of Error Nos. 6, 7, 8, 9, 10, 11, 12 (Appendix 35-36)

We deem it to be a settled principle of law that a legal custom to compensate an agent for performing extra services under a contract warrants the recovery of extra compensation.

Mechem Agency, Sec. 1522;
U. S. v. Fillebrown, 1 Pet. 28.

FOURTH: THE CONSTRUCTION OF THE AGREEMENT RELATIVE TO COMMISSIONS ON FREIGHTS EARNED BY THE LINE OUT OF CARGO SECURED BY DEFENDANT, BUT COLLECTED BY THE LINE AFTER EXPIRATION OF DEFENDANT'S TERM OF AGENCY:
DEFENDANT IS ENTITLED TO SUCH COMMISSIONS.

The following items of the bill of particulars belong to this category:

1. Commission on the Dupont de Nemours nitrate contract $25,517.80
2. Commission on inward freight of "Governor Forbes" 2,049.65
3. Commission on estimated freight earned by other steamers 5,000.00

$32,567.45.

In all these cases the cargoes were secured by defendant before October 1, 1917, the date of termination of his agency. The freight money on the cargo thus secured during the term of defendant's agency was, however, not paid to the line until after the expiration of the term.

Defendant contends that he is entitled to the 5% commission on this freight under the contract.

In this connection it must be noted that the nitrate contract with Dupont de Nemours Company was originally made by defendant on his own behalf, and that defendant notified plaintiff that if he took it over, it would be subject to defendant's 5% commission. Plaintiff assumed the contract, carried the nitrate in his vessels, and collected an

amount of freight-money entitling defendant to $25,517.80 as a 5% commission on said amount.

The court denied all the instructions requested by defendant to the effect that defendant had a right to these commissions and, by directing a verdict in favor of plaintiff, ruled that defendant had no right to any of these commissions (Assignment of Errors Nos. 33, 34, 35, 36, 43, 44; Appendix, pp. 44-48).

The principal service to be performed by defendant in the course of his agency was the securing of cargoes for the steamers of the line. A subordinate and contingent service was the fixing of charters for the steamers (if advisable).

The compensation allowed in the agreement for these services was, correspondingly:

(I) "Commission of 5% *on all freight earned*" out of cargoes secured;

(II) "Commission of 2½% *on the freight earned*" out of charters secured.

This commission was "allowed" when the services were rendered.

When were the services rendered by defendant and his commission "allowed"? Obviously when, in the case of contracts of affreightment, the cargo was secured by the making of the contracts and when, in the case of charters, the charter was fixed. After that other agents of the line attended to the

further business connected with the steamers and cargoes down to the point when the freight money was paid; but defendant's business was finished, and his commission "allowed", *when the contract of affreightment was made by him.* Had the contract been that the commission was allowed on all "freight *received*", or on all "freight *collected*", or on all "freight *paid*", it would indicate an intention of the parties to allow to the agent a commission only on freight actually collected or received during the term of his agency; but the language used in the agreement: that the commission was allowed on all "freight *earned*" indicates an intention to make the commission independent of the time of the collection or payment of the freight.

> "To '*earn*' means '*to gain* as a just return or recompense by service, labor or exertion'."
> *Dayton v. Ewart,* 72 Pac. 40.

This is independent of the time of receipt or collection of the recompense; the recompense is earned when the person performing the labor *has gained the right to the recompense.*

"Freight earned", in the agreement, means, therefore: Freight gained by the steamship line, or which the line has a right to receive, as the result of defendant's service. On ALL such freight a commission of five per cent is expressly allowed. Whenever paid to the steamship company, this freight is earned by it, as the result of the service, labor and exertion of defendant.

It follows that defendant must be allowed the agreed commission on all freight which the steamship line acquired a right to collect in consequence of defendant's services.

This construction is confirmed by allowing the commission not only on "freight earned", but "on *all* freight earned", excluding the idea of any distinction between freight received at one time or another.

In *S. H. Greene & Sons v. Freurd,* 150 Fed. 721 (C. C. A., 2nd Circ.), plaintiff made a contract with defendant to act as its agent in procuring orders for the bleaching, printing and dyeing of cotton goods, in which business defendant was engaged. The contract provided that the plaintiff should receive a commission, to be paid on all the work secured by him. The Circuit Court of Appeals for the Second Circuit *held* that on the termination of plaintiff's agency he was entitled to recover from defendant commissions, not only on the work done prior to the termination of the agency, but also on all work called for by contracts secured by the agent, by the acceptance of his offers by customers.

In the instant case, as in the case cited, the commission agreed upon was compensation for work secured by the agent, viz, for the work of securing cargoes for the steamers of Baja California line. The business of the agent was not the earning of the freight, but the procuring of the contracts. When he had secured the cargoes by procuring the con-

tracts of affreighment, he was to be allowed the commission, as a reward of his service.

The quantum of the commission, the amount of his compensation, was to be figured out on the basis of a percentage "on all freight earned". The question was, therefore, simply: What freight was earned out of the cargoes secured by defendant? And the computation of the amount of the commission was made by calculating 5% "on all freight earned" out of cargoes so secured.

In *Singer Sewing Machine Co. v. Brewer,* 78 Ark. 202, a sewing machine agent was to receive a 15% commission on sales; there was a proviso that "all his claims therefor shall cease immediately upon the termination of this agreement". *Held,* the proviso does not apply to the 15% commissions earned, but not yet payable, when the contract of agency terminated.

This principle would hold even if the plaintiff had seen fit to have the shippers execute new written contracts for the transportation of the cargoes.

Merriman v. McCormick Harv. Mach. Co.,
71 N. W. 1050 (Wis.).

The construction here contended for accords with the general proposition that the agent is entitled to his compensation when he has fully completed his undertaking according to its terms. The inquiry in every instance must be: 1. What did the agent undertake to do? 2. Has he done it?

Mechem, Agency, Sec. 1532.

In the instant case defendant undertook to secure cargoes for the steamers of the "Baja California" line, and he did secure them. When he had done this, he was to be allowed, and was entitled to, his commission. To compute the amount of this commission, it was necessary to determine the total amount of all freight earned on the cargoes secured by defendant and to allow to defendant 5% of this total amount.

IN CONCLUSION.

It is respectfully submitted that the court erred in denying to defendant all compensation for services rendered in connection with the construction of the steamers "Regulus" and "Romulus", and the purchase of the steamer "Governor Forbes", and the salving and repairing of the steamer "Sinaloa", and in denying to defendant all compensation for securing the nitrate cargoes of Dupont de Nemours Company, and the inward cargo of the "Governor Forbes", and the cargoes on which freight was paid after October 1, 1917.

On the grounds stated the judgment of the District Court should be reversed.

Dated, San Francisco,
May 16, 1921.

Respectfully submitted,
ANDROS & HENGSTLER,
GOODFELLOW, EELLS, MOORE & ORRICK,
Attorneys for Plaintiff in Error.

(APPENDIX FOLLOWS.)

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Appendix

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I. NO VERDICT FOR A GREATER SUM THAN THE SUM TOTAL OF THE ITEMS OF THE BILL OF PARTICULARS, VIZ., $58,532.75, IS JUSTIFIED UNDER THE PLEADINGS.

(a) Quotations from and references to record relative to assignments of error.

The items specified in the bill of particulars are:

Charge for Hull 154 ("Romulus")	$10,000.0
Commission Dupont Powder contract	25,517.80
Commission inward freight "Governor Forbes"	2,049.65
Commission purchase "Governor Forbes"	6,800.00
"Sinaloa" salvage account	3,165.27
Balance estimated freight bookings	5,000.00
Charge for superintending construction of "Regulus"	6,000.00
Total	$58,532.72

(Record, pp. 6 and 9.)

The above mentioned items are referred to in two letters which are incorporated in the bill of particulars. The bill of particulars then states:

> "That the items stated in said two letters, *plus $12,050, for the details of which we have sent to Christiania* * * * are the items which constitute the bill of particulars * * * *upon which* this complaint is based."
>
> (Record, pp. 9-10.)

The complaint alleged that defendant had collected for plaintiff's account	$70,582.72
The bill of particulars specifies	58,532.72
Balance unspecified	$12,050.00

The directed verdict was for the amount of $70,582.72 (and interest), being $12,050 in excess of aggregate claim specified in bill of particulars.

One of the letters quoted in the bill of particulars also contained an item of $3119.12 on account of overpayment of freight upon the Dupont contract, but the correctness of this item was conceded near the end of the bill (Record, p. 10).

(b) Defendant contends that the court erred in directing a verdict in excess of plaintiff's claim by the sum of $12,050 and in entering judgment against defendant on said verdict.

(c) Assignment of error as to $12,050 not specified in bill of particulars.

Assignment of Error No. 23:

"In sustaining plaintiff's objection to the following question propounded by defendant to the witness, C. Henry Smith:

> 'Q. Now, as a matter of fact, Mr. Smith, so far as you can tell at the present time what are the disputed items, or the amount of them'?"
>
> (Record, p. 237.)

Assignment of Error No. 24:

"In sustaining plaintiff's objection to the following question propounded by the defendant to the witness, C. Henry Smith:

> 'Q. I will ask you to state whether Mr. Linvig, or any one else connected with the plaintiff in this case, or anyody else, has ever stated to you what the item of $12,050 has reference to which is mentioned in the bill of particulars filed by the plaintiff in this case, and as to which it is therein stated that they are sending to Christiania for details'?"

(Record, pp. 215, 237.)

Assignment of Error No. 25:

"In sustaining plaintiff's objection to the offer in evidence of the following cablegram relating to stock in the corporation owning the "Regulus" from the defendant to the plaintiff, dated January 11, 1916:

> 'Stock accepted; letter twenty-first December'."

(Record, pp. 216, 238.)

Assignment of Error No. 46:

"In refusing to give instruction No. 16, requested by the defendant, and reading:

> 'The court instructs the jury to find in favor of the defendant as to the item of $12,050 referred to in plaintiff's bill of particulars, for the details of which it is therein stated that the plaintiff has sent to Christiania'."

(Record, pp. 22, 246.)

II. "REGULUS": THE CHARGE OF $6000 FOR CONTRACTING AND SUPERINTENDING HER CONSTRUCTION.

(a) Quotations from and references to the record.

On December 23, 1915, defendant entered into a contract with a San Francisco shipbuilding firm for the construction of the "Regulus" at the contract price of $450,000 (Record, p. 34). Although authorized by plaintiff's cables to enter into this contract (Record, pp. 28-29), defendant assumed the responsibility of executing the contract in his own name.

> "I did this because my principal was a foreigner, and the United Engineering Company wanted my name on the contract."
>
> (Record, p. 33.)

That the services rendered by the defendant in securing and entering into this contract for the construction of the "Regulus" were of very great value to the plaintiff, is a fact which cannot be denied. The two vessels contracted for by the defendant as the agent of the plaintiff were the "Regulus" and the "Romulus". The "Regulus" contract was executed on December 23, 1915, and the "Romulus" contract on September 15, 1916 (Record, pp. 34, 82). They were sister ships of the same tonnage and specifications (Record, p. 91). The contract price of the "Regulus" was $450,000, while the contract price of the "Romulus" was $775,000.

"The difference in these contract prices was due to the rising value of materials during the interval."

(Record, p. 91.)

That the defendant devoted a great deal of time to the general supervision of the construction of these vessels, is also undisputed. Both of them were built on the Oakland Estuary, and the defendant's offices were in San Francisco.

"All of the time that these vessels were building I had to go over there and be in conferences with the inspectors and to watch the specifications so it took a great deal of my time."

(Record, pp. 81-82.)

(b) In his annual report made as president of the corporation which owned the "Regulus", the plaintiff admitted the correctness of this $6000 charge by the defendant.

To own and operate the "Regulus" the plaintiff formed a separate corporation, which is known as "The Pacific Limited". The "Baja California" and the "Sinaloa", the two vessels built at Sunderland, England, were owned and operated by the "Baja California" Company.

The defendant testified:

"The 'Regulus' made her first outward voyage in April and all the vouchers were in and the account closed by June 1st, 1917. In my statement of account with Mr. Lindvig dated June 1st, 1917, I included the following item 'Remuneration account building steamship "Regulus" $6000'."

(Record, pp. 66-67.)

On July 18, 1917, the plaintiff wrote the defendant acknowledging receipt of the letter and account of June 1st and in respect to the "Regulus" item his letter reads:

> "Your statement of first June. As far as I can see hitherto, there is no voucher concerning the item 'Remuneration account "Regulus" $6000'. Please explain same."
>
> (Record, p. 71.)

In reading this correspondence the delays in the mail existing at that time should be kept in mind. The defendant testified that the above mentioned letter dated July 18, 1917, was not received by him until October 15, 1917 (Record, p. 70).

On August 28, 1917, the plaintiff wrote the defendant a letter reading in part as follows:

> "I have now gone through your accounts enclosed in your letter of June 1st, and find same in order with the exception of following items in the general statement dated June 1st:
>
> Rebalance from s/s 'Sinaloa' voyage 8 is transferred with the amount of $41,699.41
>
> While the statement says 40,611.99
>
> Which makes a difference in your favor of $1,087.42."
>
> (Record, pp. 71-72.)

> "As formerly told you, there was no voucher regarding remuneration a/c building SS 'Regulus' $6000."
>
> (Record, p. 72.)

On November 8, 1917, the defendant wrote the plaintiff a letter reading in part:

> "STATEMENT FIRST OF JUNE.
>
> "Regarding this voucher, we have sent you one as far as I remember and it is for attending to contract, making payments and keeping books for this vessel and also for protecting the contract."
>
> (Record, pp. 73-74.)

The defendant testified:

> "I do not remember whether I sent a voucher for the $6000.00 as part of the remuneration building of the steamship 'Regulus' with my statement of June 1st, but I sent a voucher afterwards."
>
> (Record, p. 73.)

The plaintiff had organized the Pacific Company to own the "Regulus", and as the president and general manager of the company, he doubtless desired a voucher or receipt signed by the defendant to represent the $6000 which the defendant then sent him.

On April 11, 1918, plaintiff sent out a written report to the stockholders (Record, pp. 77-78), covering the operation of the "Regulus" from the date of its completion to the end of 1917, and notifying them that:

> "The annual stockholders' meeting will take place at my office, Thursday, April 25th, at 1 P. M."
>
> (Record, p. 80.)

This report recognizes defendant's commission as a part of her construction cost, and reads:

"Report for the Year 1917—(4/1—12/31).

"The company 'Pacific' Limited, was established at a meeting of November 23, 1916, with a capital of Kr. 950,000.00 paid in full, in order to purchase the contract for a 6000 ton steamer built at the Union Iron Works, San Francisco, at a price of $450,000.00, for delivery in December, 1916.

"As the ship was contracted for a single decker, an additional sum had to be paid for furnishing a tween deck. Wireless telegraph as well as various other extras were also arranged for. *The total cost of the ship was Kr. 1,856,329.41.*

"To cover the amount a 5½% loan of Kr. 600,000.00 was obtained from the Sorske Skibs Hypothenkbank for a mortgage on the ship. The balance was covered by cash credit in Andresens Bank a/s.

"The delivery of the ship was somewhat delayed (partly on account of strikes), and it was not taken over until April, 1917. The builders paid $10,000.00 as a compensation for the late delivery.

"The ship, which was named the 'Regulus', immediately commenced loading general merchandise in San Francisco, bound for South American ports, as far as Valparaiso. It brought back a full cargo of Nitrate, and has since been running regularly between Puget Sound, San Francisco and South America.

"The voyages have been made without any serious accidents, and the ship has completed 2½ round trips during the three quarters of a year it has been running.

"C. Henry Smith acted as Agent in San Francisco until October 1, 1917, when the A. O.

Lindvig Company established their own office in the City.

"The freight rates southbound increased considerably during the year, especially the last months: for instance, the freight amount for southbound trip in September amounted to $147,000.00 against $178,000.00 in December, and there is at the present time apparently no sign of a decrease in the rates.

"For the northbound voyages the ship has been on a contract for $13.75 per ton on Nitrate to San Francisco, with a small additional payment for discharging up north. The contract will expire about May, 1918, and thereafter we can expect a raise on these rates also.

"A dispute has unfortunately arisen with the former agent, C. Henry Smith, as Mr. Smith withheld about $52,000.00 of the collected freight, to cover various commission charges, which we consider him absolutely not entitled to. The dispute will probably be settled this summer.

"As shown by the following statement, the ship has earned a total freight of Kr. 2,033,983.36, with a net profit of Kr. 1,096,420.32. After deducting interest charges, registration fee, etc., the money at disposal amounts to Kr. 1,012,346.65, which will be disposed of as follows:

Written off on the ship	Kr. 256,329.41
Reserved for boiler & survey funds	100,000.00
Reserved for taxes for 1917	350,000.00
30% dividend to the shareholders	255,000.00
carried into new account	51,017.24
	Kr. 1,012,346.65

"The 30% dividend was given on January 2nd, this year.

"Due to the low exchange on dollars, the money has not been transferred to Norway, but deposited in a San Francisco bank. At the end of the year this deposit amounted to $284,-812.83. At the same time we had debts in the Andresens Bank A/S, amounting to Kr. 560,-422.31. The mortgage has been reduced with 5%, viz, Kr. 30,000.

"The annual stockholders' meeting will take place at my office Sjofartsbygningen, Thursday, April 25, at 1:00 P. M.

Kristiania, April 11, 1918.

A. O. Lindvig.

Cost of the S.S. REGULUS'.

Contract price $450,000.00	Kr. 1,630,500.00
Putting in tween decks, various extras and improvements outside the contract Kr. 204,229.41	204,229.41
COMMISSION FOR CONTRACTING THE SHIP, CHARGED BY C. HENRY SMITH $6000	21,600.00
	1,856,329.41"

(Record, pp. 79-81.)

Apparently plaintiff was not then aware of the fact that his local representatives had challenged defendant's right to retain this commission of $6000.00. Plaintiff's report to the "Pacific Limited" stockholders was dated April 11, 1918. The complaint in this action was filed December 15, 1917. The complaint was verified by B. Lindvig, the son of plaintiff, who had been in San Francisco since the fall of 1916.

It is apparent from plaintiff's report to the stockholders of the "Pacific Limited" that he himself concedes defendant's right to this commission, and has already charged it against the construction of the "Regulus".

The plaintiff presumably advanced the money for the construction of this vessel, as the vessel was contracted on December 23, 1915, and the "Pacific Limited", according to the plaintiff's reports to its stockholders, "was established at the meeting of November 23, 1916". This report states "the total cost of the ship was 1,856,329.41 Krs." Included within the items comprising this 1,856,329.41 Krs. is the defendant's charge of $6000.00. The effect of the verdict directed against the defendant is, that the plaintiff keeps this $6000.00 which he represented to the stockholders had been paid to the defendant.

(c) The agency contract between the plaintiff and the defendant was in respect to certain specified duties to be performed by the defendant in respect to appointing sub-agents and procuring freight for vessels of the Baja California Company. The "Regulus" was never owned by that company, and it is immaterial that plaintiff intended to put her in the same business as the "Baja California" vessels.

> "Mr. A. O. Lindvig, of Christiania, and Mr. C. Henry Smith of San Francisco have this day made the following agreement *with regard to A/S Baja California,* a steamship line, to operate steamers between Mexican and Central American Ports and the West Coast of the United States as well as British Columbia.

"For the steamship line as aforementioned Mr. Smith is to act as general agent with authority to appoint subagents, when required, *for securing cargo* northbound and southbound, *fix charters* when sufficient inducements offer, as well *make all necessary arrangements for docking and clearing of the steamer at the respective ports of call.*

"It being also understood that the general agent or subagents *are to make contracts,* at the lowest competitive rates, *for tallying and stevedoring.* On all freight earned a commission of five per cent is to be allowed Mr. Smith, including any allowance or allowances made to subagents—besides this remuneration an allowance per steamer is to be made to cover incidentals, stamps and other disbursements and for travelling expenses, as required, subject to special agreement.

"*In the event any steamer or steamers of the A/S Baja California* are fixed by Mr. Smith for other voyages than as hereinbefore mentioned, or on time charter, a commission of 2½ per cent on the freight earned is allowed.

"This agreement is to remain in force for a period of three years, provided the line referred to above is maintained so long.

"Christiania, 29th June, 1914.

(Sgd.) A. O. Lindvig,
(Sgd.) C. Henry Smith."

("A/S" stands for corporation.)

(Record, p. 26.)

As is plainly evident from the terms of this freight agency contract, the contracting for, and the superintending of *construction* of vessels by the defendant is not included within the compensation or duties mentioned in the contract, even though built for the "Baja California" Company, or even

if intended to be put into service with the vessels of the "Baja California" Company.

Respecting his duties under the agency contract, the defendant testified:

> "I have nothing to do with the operation of the vessels, their outfitting, or their tackle, furniture, or repairs, or with the appointment of their masters, or the employment of their crews, or anything to do with the furnishings of provisions and stores, or with the preservation of proper certificates, or surveys, or their insurance, or management."
>
> (Record, p. 125.)

In point of fact, the "Regulus" was never owned by the "Baja California" Company.

On December 10, 1915, eight days before the construction contract was signed the plaintiff wrote the defendant a letter, reading in part:

> "I note you are willing to take interest for $100,000 and that others are also inclined to take some stock, but as I have not yet made up my mind if the steamer is going to enter the Baja California, I shall write you later on this subject.
>
> (Record, p. 30.)

On December 21, 1915, two days before the construction contract was signed the plaintiff wrote the defendant a letter, in part reading:

> "I have decided not to let this vessel go into the 'Baja California' Company, but to form a new company, which I have thought of naming the Joint Stock Company, Pacific."
>
> (Record, pp. 52-53.)

At the time of the execution of the agency agreement the "Baja California" Company was "to operate steamers between *Mexican and Central American ports* and the west coast of the United States as well as British Columbia" (Record, p. 26).

In his report for the year 1917 to the stockholders plaintiff states:

> "The ship, which was named the 'Regulus', immediately commenced loading general merchandise in San Francisco, bound for *South American ports, as far as Valparaiso.* It brought back a full cargo of nitrate, and has since been run regularly between Puget Sound, San Francisco and *South America.*"
>
> (Record, p. 79.)

When the vessel was nearing completion, the question arose as to whether or not the Shipping Board would permit her ownership by a Norwegian corporation. The plaintiff was very desirous that the ownership of the vessel be transferred to the ownership of the "Pacific Limited", which was a Norwegian corporation, and wrote a letter to this effect to the Norwegian Legation at Washington (Record, p. 62).

On March 8, 1917, the defendant cabled the United States Shipping Board as follows:

> "United States Shipping Board,
> Munsey Building, Washington, D. C.
> In December, nineteen fifteen, a contract was entered into between undersigned and United Engineering Works for the construction and sale of a steel steamer Regulus stop. Under-

signed was acting solely as agent for A. O. Lindvig of Norway, who furnished the money for the purchase, the contract having been made in his behalf and confirmed by him stop. The ship is practically completed and is advertised for sailing to *South America* on Thursday next, all cargo having been booked and much of it having arrived in San Francisco ready for shipment stop. Norwegian Counsel stands ready to give Norwegian temporary registry stop. Since ship owned by Norwegian and neither enrolled, licensed or registered American am advised by consul that Shipping Act does not apply stop. However, in order that no possible misunderstanding later, we hereby explain transaction stop. Simply desire to know that no objection by Board to completion of contract by final payment to builder by undersigned for Lindvig and delivery to Lindvig of formal bill of sale so that vessel can get away stop. Any delay beyond that time means loss of more than two thousand dollars daily stop. May we ask for reply at your earliest convenience.

C. Henry Smith, Inc."

(Record, p. 56.)

On March 29, 1917, the following telegrams were exchanged between the defendant and the United States Shipping Board:

"March 29, 1917.

"United States Shipping Board,
Munsey Building, Washington, D. C.

"In consideration of the United States Shipping Board having waived any and all right to purchase, under section nine of the United States Shipping Act of September seven, nineteen sixteen, the steamer Regulus, now in the port of San Francisco, California, and having

also granted and approved the sale and transfer of said steamer to A. O. Lindvig of Christiania, Norway, said A. O. Lindvig does hereby agree with said United States Shipping Board that said steamer Regulus will make three consecutive round trip voyages from said San Francisco or from other American port or ports on the Pacific Coast of North America, to port or ports *on the west coast of South America,* and that the first of said round trip voyages will be commenced within twenty-one days from date.

A. O. Lindvig,
By C. Henry Smith, Inc.,
Agent."

"We guarantee that the above agreement will be carried out by the 'Regulus'.

C. Henry Smith, Inc."

"March 29, 1917.
San Francisco, Cal.

"C. Henry Smith, Inc.

"In consideration of owner of Regulus entering into agreement offered in your telegram of March twenty-eighth, Shipping Board waives any right it may have to purchase Regulus under provisions sections nine shipping act; prepare agreement and forward same to board. Board looks to your personal assurance of its performance as much as to terms of contract.

"Shipping Board."

(Record, pp. 62-63.)

It thus appears that not only did the defendant assume a personal responsibility for $450,000.00 by signing the contract for the construction of the vessel as the principal, but in order to carry out the plaintiff's wishes that she remain in private ownership, the defendant gave his personal guarantee

that if the Government permitted the transfer to the Norwegian corporation she would make at least three voyages between the Pacific Coast ports of North America and the West Coast of South America, from where she was returning with nitrate cargoes consigned to the Dupont Company (Record, p. 111).

(d) The defendant should have been permitted to show that plaintiff allowed him to purchase stock only to the extent of $3000 out of the total of $450,000 in the Pacific Limited.

While it may be true that it is largely immaterial whether the defendant was or was not permitted to acquire any stock interest in the Pacific Limited, yet it seems to us that as one of the circumstances bearing upon his right to compensation for her construction, it was pertinent to show that the plaintiff treated the defendant's request to subscribe for $100,000 worth of stock wholly as a matter of favor, and finally allowed the entire subscription by the defendant and Dupont officials only to the extent of $54,000, with the result that the defendant was only allowed to obtain stock to the amount of $3000 for himself the balance of the $54,000 going to the United Engineering people (Record, p. 114).

On November 30, 1915, the defendant cabled the plaintiff:

> "Have option six thousand (6000) tonner United Engineering Works here model and arrangement like steamer Sverre and oil burner, delivery within twelve months, four hundred

and fifty thousand dollars, tween deck and electric light fifteen thousand extra. I can guarantee one hundred thousand dollars subscription of stock this city, if wanted, and further subscription South American builders have option steel only few days so please telegraph quickly if interested."

(Record, p. 27.)

On December 6, 1915, defendant cabled plaintiff:

"Six thousand tonner lowest price account steel now advanced and mills busy two years guaranteed speed nine knots. Will subscribe hundred thousand dollars stock. Some of Dupont officials will also take shares."

(Record, p. 28.)

On December 10, 1915, plaintiff wrote the defendant:

"I note, you are willing to take interest for $100,000—and that others are also inclined to take some stock, *but as I have not yet made up my mind if the steamer is going to enter the 'Baja California' Company, I shall write you later on this subject.*"

(Record, p. 30.)

On December 14, 1915, defendant wrote plaintiff:

"We are prepared to arrange for subscription of stock in this steamer to the extent of $100,000.00, as advised in the cables and we should therefore like to know at an early date the name of the company and how these subscriptions should be made."

(Record, p. 33.)

On December 21, 1915, plaintiff wrote defendant:

> *"I have decided not to let this vessel go into the* 'BAJA CALIFORNIA' *company, but to form a new company, which I have thought of naming the joint stock company 'Pacific'.* I enclose copy of subscription circular, from which you will note that the joint capital is placed at Kr. 850,000—as a mortgage loan will be raised for the rest of the purchase price. The value of the shares will be Kr. 5000 each. Up to the present has been subscribed Kr. 635,000. And I have therefore for the present reserved for you an amount of up to Kr. 200,000, and will be obliged for your telegraphic reply upon receipt hereof, if you are considered included herewith."
>
> (Record, p. 53.)

The 200,000 crowns which the plaintiff stated that he had reserved for the defendant was then the equivalent of approximately $54,000 of our money (Record, p. 54).

> "Q. You have stated in your telegram to him that you would subscribe $100,000.
>
> A. Yes.
>
> Q. But he did not reserve but about $54,000.00 to you? A. Yes.
>
> Q. Now on January 11, 1916, did you send Mr. Lindvig a cablegram of which this is a copy?
>
> Mr. FRANK. The same objection, immaterial; it has nothing to do with this transaction.
>
> The COURT. The objection is sustained, Mr. Moore; it is wholly immaterial now.
>
> "The court thereupon sustained said objection, to which ruling counsel for the defendant duly excepted, and said exception is specified and designated
>
> Exception Number One.

"The cablegram of January 11, 1916, from the defendant to the plaintiff, and which was referred to in the question to which the objection was sustained, read:

'Statsraad Lindvig,
Kristiania (Norway).

'Stock Accepted Letter Twenty-First December Sinaloa Sailed Twenty-Four Hundred Thirty Tons.

Smith'.

(Record, p. 54.)

"The defendant then offered the following cablegrams received by him from the plaintiff:

'January 19, 1916.

'If you don't wish to overtake full amount two hundred thousand Kroner Pacific, I can dispose of about one hundred thousand here please telegraph'.

"At the same time the defendant offered a cablegram by him to the plaintiff in reply to the foregoing from plaintiff. This last mentioned cablegram read:

'January 19, 1916.

'Cannot give up any of two hundred thousand Kroner stocks writing'.

"Counsel for the plaintiff thereupon objected to the introduction of the above mentioned telegram as being immaterial.

"The court sustained said objection, to which ruling the counsel for the defendant duly excepted, and said exception is designated

Exception Number Two."

(Record, p. 55.)

That the defendant only received three shares of stock, by reason of plaintiff's cutting down the amount of subscription to be allowed defendant

and the Dupont Powder people is indicated by the following question and answer:

> "Q. The stock that these friends of yours subscribed for, and the three shares that you got had not been received by you at this time? A. No."
>
> (Record, p. 58.)

All of the remainder of the $54,000 had to be delivered over by the defendant to the United Engineering people (Record, p. 114).

The correspondence and the excluded cablegrams relating to requests by defendant on behalf of himself and others to subscribe for stock in the "Regulus", indicate fully that he was contracting for the vessel and was supervising her construction, as the *representative* of the defendant, and that the plaintiff understood that the defendant was building the vessel not as an officer of the Baja California Company at all. This correspondence shows that the services were being performed by the defendant for the plaintiff, with the realization that the plaintiff *as an individual* was the principal in the matter. The plaintiff advised the defendant that he was not going to turn the vessel over to the Baja California Company, but that he was going to form the Pacific Limited to own and operate her. When the defendant expresses a willingness to subscribe for $100,000 worth of stock, the plaintiff did not hesitate to cut down a possible subscription by the defendant and those associated with him down to $54,000, without any inquiry as to what amount

this reduction would enable the defendant himself to acquire, because of possible commitments to others by the defendant at a time when his understanding was that the plaintiff was willing that the defendant and others referred to by the defendant might be permitted to acquire $100,000 worth of stock.

The "Regulus" was not built for the "Baja California" Company, and the plaintiff did not recognize any right in the defendant to subscribe for stock in connection with her ownership. The mere fact that plaintiff did not recognize defendant's right to participate in her ownership is a circumstance indicating that the defendant was to be compensated directly for his services.

The defendant's services in contracting for and supervising the construction of this vessel were outside any services to be performed by him as the freight agent of the "Baja California" steamers. The defendant was treated by the plaintiff as not having any *right* even to purchase stock in the company which owned her. Why, then, and under what theory, is the defendant to be denied compensation for his services in contracting and supervising her construction?

(e) Assignments of error as to "Regulus" item.

Assignment of Error No. 1:

In sustaining plaintiff's objection to the following question propounded by defendant to the witness C. Henry Smith:

"Q. What was the market value of the 'Regulus' at the time she was completed, on the first day of April, 1917?"

(Record, p. 229.)

Assignment of Error No. 3:

In sustaining plaintiff's objection to the following (183) question propounded by defendant to the witness C. Henry Smith:

"Q. I will ask you to state whether or not Mr. Lindvig at any time claimed that you were not entitled to your commission on the 'Regulus' until the time that he filed this suit?"

(Record, p. 229.)

Assignment of Error No. 4:

In sustaining plaintiff's objection to the following question propounded by defendant to the witness C. Henry Smith:

"Q. I will ask you to state whether or not Mr. Lindvig at any time either said to you verbally or in writing that you were not entitled to your commission on the 'Regulus' prior to the first day of December, when a question was raised in regard to that matter in a letter written by Mr. Frank, which is carried into the bill of particulars?"

(Record, p. 229.)

Assignment of Error No. 25:

In sustaining plaintiff's objection to the offer in evidence of the following cablegram relating to stock in the corporation owning the "Regulus" from the defendant to the plaintiff, dated January 11, 1916:

"Stock accepted letter twenty-first December."

(Record, p. 238.)

Assignment of Error No. 26:

In sustaining plaintiff's objection to defendant's offer in evidence of the following cablegram from the plaintiff to the defendant, dated January 19, 1916, and relating to stock in the corporation owning the "Regulus":

> "If you don't wish to overtake full amount two hundred thousand Kroner Pacific I can dispose of about one hundred thousand Kroner here please telegraph."
>
> (Record, p. 238.)

Assignment of Error No. 48:

In refusing to give instruction No. 17, requested by the defendant, and reading:

> "I charge you that the agency contract entered into by and between A. O. Lindvig and C. Henry Smith on June 29, 1914, had sole reference to C. Henry Smith acting as the agent for the 'A/S Baja California' in the operation of steamers between Mexican, Central America, West Coast of United States, and British Columbia ports; and I instruct you that the services rendered by C. Henry Smith in contracting for, and supervising the construction of the 'Romulus' and 'Regulus', and in purchasing the 'Governor Forbes', were not included within his duties as agent under said contract of June 29, 1914."
>
> (Record, p. 247.)

Assignment of Error No. 49:

In refusing to give instruction No. 23, requested by the defendant, and reading:

> "I instruct you that it is not necessary for the defendant (194) to prove an express promise

by the plaintiff to compensate the defendant for his services in connection with the contracting and building of the 'Regulus' and 'Romulus'. It is sufficient for the defendant if he proves in this behalf that the services rendered by him in connection with the contracting and building of said vessels were outside of the scope of his duties under the agency contract of June 29, 1914, and that his services in connection with the contracting and building of said vessels were beneficial to the plaintiff, and were of such a nature, and rendered under such circumstances as to imply a promise upon the part of the plaintiff to pay for such services."

(Record, p. 247.)

III. THE COMMISSION FOR CONTRACTING AND SUPERVISING THE "ROMULUS"—$10,000.

(a) Quotation from and references to the record relating to assignments of error.

On September 15, 1916, the defendant, "as representing A. O. Lindvig of Christiania, Norway", entered into a contract with the Union Iron Works for the construction of a 6000-ton vessel for $775,000 (Record, p. 82).

Defendant had been working on the matter of securing such a contract since December, 1915, and between December, 1915, and September, 1916, had obtained various options for the building of similar vessels by different yards about the bay.

"Between December, 1915, and September, 1916, I obtained a number of options for Mr. A. O. Lindvig for the building of 6000 ton vessels by various yards here, and we finally came

> to the conclusion of closing this contract for the construction of Hull 154 as the 'Romulus' was called during the time of her building."
>
> (Record, p. 81.)

This vessel was also built in the Oakland estuary, and a considerable amount of defendant's time was occupied in going over to where the vessel was being built and conferring in regard to the carrying out of the plans (Record, p. 81).

With respect to the "Romulus" the defendant also indicated to the plaintiff that he would like to be permitted to subscribe for some stock; but was finally informed by the plaintiff that the latter had decided to keep the vessel entirely to himself and not form any company to take over her ownership.

On September 13, 1916, just two days prior to entering into the contract for the construction of the "Romulus", the defendant cabled plaintiff:

> "New contract 6000 tonner eventually stock desired about $50,000."
>
> (Record, p. 92.)

On July 16, 1917, the defendant cabled the plaintiff:

> "Have you decided regarding fifty thousand dollar stock I asked you to reserve September last year second new building stop. Please let me have the information now, as it is of importance to me. Smith."
>
> (Record, p. 76.)

On July 20, 1917, the plaintiff cabled the defendant:

"No decision stock second new building, *but shall probably keep the boat myself.*"

(Record, p. 76.)

The defendant further testified:

"As a matter of fact I never owned any stock, or acquired any stock in the company that took over hull one hundred and fifty-four ('Romulus'), if any company ever took her over."

(Record, p. 76.)

The defendant testified:

"The vessel was commandeered by the United States Shipping Board under their letter, dated August 24, 1917, and I continued to send cablegrams to Mr. Lindvig concerning this matter during Septemebr, and to correspond with the United States Shipping Board in regard to it. In my account to Mr. Lindvig of October 15, 1917, I included the following items:

"Office remuneration of handling contract Union Iron Works, a/c Hull 154, attending to payments, etc., $10,000.00."

(Record, p. 76.)

This $10,000 to defendant was included by plaintiff to the Federal Government as one of the items of the vessel's cost, when plaintiff submitted the items of cost paid out by him to the United States Shipping Board, which was appointed to represent Norwegian owners of commandeered vessels.

The copy of the bill submitted by plaintiff to the United States Shipping Board, and produced by plaintiff upon the trial at the demand of the defendant, reads:

"July 3, 1918.

United States Shipping Board
to
A. O. Lindvig,
Kristiania, Norway.

For disbursements, account building Hull No. 154, known as S.S. "Romulus", commandeered by the United States Government	$232,500.00
Union Iron Works, payments on building contract	232,500.00
Edward S. Hough, services rendered superintending building of ship	1,250.00
C. Henry Smith, cost of cables regarding building of ship and contract, to and from Kristiania, Norway	2,000.00
C. Henry Smith, Remuneration for Procuring and Handling Contract, Union Iron Works, Attending to Payments, Etc.	10,000.00
Nathan H. Frank, services rendered matter of proposed requisition of said vessel	800.00
A. O. Lindvig, expenses of inspector Hooslef	1,876.50
	$248,926.50"

(Record, p. 93.)

John McClelland, with Henry Lund & Co., importing, exporting and shipping agents, testified that they had contracted for the building of vessels at San Francisco for the account of owners at Norway, and that for defendant's services in contracting for the building of the "Regulus" and "Romulus" he should have received one and one-half per cent of the contract prices as a minimum (Record, p. 135).

(b) Assignments of error as to "Romulus" item.

No. 2. In sustaining plaintiff's objection to the following question propounded by defendant to C. Henry Smith:

> "Q. What was the market value of the 'Romulus' at the time of her completion?"
>
> (Record, p. 229.)

No. 48. In refusing to give instruction No. 17, requested by the defendant, and reading:

> "I charge you that the agency contract entered into by and between A. O. Lindvig and C. Henry Smith on June 29, 1914, had sole reference to C. Henry Smith acting as the agent for the 'A/S Baja California' in the operation of steamers between Mexican, Central American, West Coast of United States, and British Columbia ports; and I instruct you that the services rendered by C. Henry Smith in contracting for, and supervising the construction of the 'Romulus' and 'Regulus', and in purchasing the 'Governor Forbes', were not included within his duties as agent under said contract of June 29, 1914."
>
> (Record, p. 247.)

No. 49. In refusing to give instruction No. 23, requested by the defendant, and reading:

> "I instruct you that it is not necessary for the defendant to prove an express promise by the plaintiff to compensate the defendant for his services in connection with the contracting and building of the 'Regulus' and 'Romulus'. It is sufficient for the defendant if he proves in this behalf that the services rendered by him in connection with the contracting and build-

ing of said vessels were outside of the scope of his duties under the agency contract of June 29, 1914, and that his services in connection with the contracting and building of said vessels were beneficial to the plaintiff, and were of such a nature, and rendered under such circumstances as to imply a promise upon the part of the plaintiff to pay for said services."

(Record, p. 247.)

In directing a verdict in favor of the plaintiff, assignments 29 and 51 (Record, pp. 239, 247).

IV. COMMISSION PURCHASE "GOVERNOR FORBES"—$6000.

(a) References to record relating to assignments of error.

Mr. Smith arranged to buy the "Governor Forbes" in September, 1916, for $340,000, with a 2 per cent commission. This 2 per cent was mentioned in his opening cablegram to Mr. Lindvig, which stated: " 'Governor Forbes' offered firm $350,000 plus 2 per cent commission" (Record, p. 94). When the "Governor Forbes" arrived at San Francisco, Mr. Smith was in Europe, and it was not discovered until the examination of his books by public accountants in late October, 1917, that the commission had not been previously charged (Record, p. 145).

But whether under an express contract or upon a *quantum meruit* Mr. Smith was entitled to this commission. As he testified:

"I purchased the steamer and I took the responsibility for inspection and classification that she was as represented and I delivered the steamer to him."

(Record, p. 94.)

(b) Assignment of errors as to commission on purchase of "Governor Forbes".

No. 5. In sustaining plaintiff's objection to the following question propounded by the defendant to the witness, C. Henry Smith:

"Q. What was the value of the 'Governor Forbes', the market value here in San Francisco, at the time of her delivery in 1917?"

(Record, p. 230.)

No. 47. In refusing to give instruction No. 15, requested by the defendant, and reading:

"The defendant is entitled to recover a commission on the purchase of the 'Governor Forbes', notwithstanding he may have entered into an agreement for the purchase of said vessel in November, 1916, and notwithstanding the payment of her purchase price, may have been completed in the spring of 1917, provided you believe from the evidence that the services rendered by the defendant in connection with the cablegrams exchanged between him and the plaintiff entitled him to such a commission, and provided you believe that the omission to enter said commission upon any of the accounts presented to the plaintiff prior to October 1, 1917, was due to inadvertence and mistake."

(Record, p. 246.)

No. 48. In refusing to give instruction No. 17, requested by the defendant, and reading:

"I charge you that the agency contract entered into by and between A. O. Lindvig and C. Henry Smith on June 29, 1914, had sole reference to C. Henry Smith, acting as the agent for the 'A/S Baja California' in the operation of steamers between Mexican, Central American, West Coast of United States, and British Columbia ports; and I instruct you that the services rendered by C. Henry Smith in contracting for, and supervising the construction of the 'Romulus' and 'Regulus', and in purchasing the 'Governor Forbes', were not included within his duties as agent under said contract of June 29, 1914."

(Record, p. 247.)

V. "SINALOA" SALVAGE ACCOUNT—$3165.27.

(a) Quotations from and references to the record relating to assignments of error.

All of the evidence offered by the defendant was excluded. The defendant offered to show that the "Sinaloa" went aground in the fog near Cape Blanco, Mendocino County, on the morning of June 16, 1916; that Lindvig requested Smith to do everything possible to save her; that Smith went immediately to the vessel, contracted for her salving, co-operated with the underwriters, disbursed the funds, and that when she was floated, Smith had her brought to San Francisco and there submitted her to competitive bidding, and afterwards when the lowest bidder did not care to go on with the work, he took the matter up with the United States Shipping Board and arranged that the repairs be proceeded with in order to enable the "Sinaloa" to

continue the carrying of nitrate for the Dupont de Nemours Company (Record, pp. 105-109).

Wilferd Page, of George E. Billings Company, general average adjusters, produced a printed book which constituted an adjustment of the general average and salvage expenses in connection with the wreck of the "Sinaloa" (Record, p. 132). This book was completed in August or September, 1918 (Record, p. 132). Copies of this book were delivered to Mr. Lindvig, for the owners of the vessel (Record, p. 132). On page 226 of this book appears the following item:

> "$3,165.27. C. Henry Smith, remuneration for handling a/c 5% com. on $63,305.54.....$3,165.27"
> (Record, p. 131.)

After showing by Mr. Page that copies of this book were delivered to Mr. Lindvig, an objection was sustained and an exception noted in respect of the following question asked Mr. Page by the defendant:

> "Q. I will ask you to state whether Mr. Lindvig ever thereafter, or any member of his office, dissented from the item therein contained, the $3165.27 allowed to Mr. Smith in connection with his services with respect to the salvaging of this vessel?"
> (Record, p. 132.)

In respect to the cargo, objection was sustained and exception noted as to the following question to Mr. Page:

"Q. Was there any contribution to be made by them to the general average?"

After stating that he had nothing to do with the collections from the underwriters, objection was sustained and exception noted in respect of the following question:

"Q. So far as the cargo was concerned, do you know whether or not Mr. Lindvig has, in fact, collected from the cargo upon the basis of including in the general average this item of $3165.27 allowed to Mr. Smith?"

(Record, p. 133.)

John A. Bishop, with Johnson & Higgins, average adjusters, testified:

"Q. Have you had occasion at numerous times to observe what is the practice, if any, with respect to allowance to general agents of reimbursement to themselves for services rendered in connection with salvaging of vessels where their contracts provide that they shall have a fixed percentage of the freight earned or carried?

A. I have had numerous instances.

Q. Numerous instances? A. Yes.

Q. Will you name a few of the instances that you remember in which you have made observation in connection with that practice or custom?

A. Williams, Dimond & Co., agents of the American-Hawaiian Steamship Company, Lennon Gray, who was the agent for some British shipowners, Balfour, Guthrie & Co., agents for the Harrison Direct Line. We have had several instances for Williams, Dimond, as agents for the American-Hawaiian Line. I suppose I could name at least from six to eight without going back on my records at all.

Q. Would you do that, please?

A. In the case of the 'Alaskan', belonging to the American-Hawaiian Line, Williams, Dimond & Co. were general agents on the Coast; she was on fire in San Diego in 1910. The 'Pennsylvania' was also on fire down near Panama, bound for San Francisco; the 'Anubis', of the Cosmos Line, went ashore in, I think it was, 1908, near Santa Barbara, on San Miguel Island; Lennon Gray was the agent for the Cosmos Line at that time. The 'Pleiades' was ashore on the Southern California coast, belonging to the Luckenbach Steamship Company, Williams, Dimond & Co. were agents. The 'St. Nicholas', a British vessel, was on fire bound in to San Francisco, Balfour, Guthrie & Co. were agents; the 'Queen Alexandria' struck on the Columbia River Bar, putting into San Francisco, E. C. Evans, of San Francisco, were agents."

(Record, p. 128.)

The questions which follow were then asked Mr. Bishop, objections sustained to them and exceptions to the rulings noted by the defendant:

"Q. I will ask you to state whether or not, in all the cases mentioned by you occurring with respect to the vessels named, of which Williams, Dimond & Co. were the agents, and Mr. Gray was the agent, and Evans was the agent, whether or not in each and every of these cases the general agent was allowed compensation for the services rendered by him in connection with those vessels?

Q. I will ask you whether or not it is the custom in all cases where the general agents render services in connection with the salvage of the vessel, to not only allow him from his principal a compensation for the general services in connection therewith, but an allowance

of 2½ per cent in the total amount of disbursements in connection therewith, if the money be that of his principal, and 5 per cent if the money be that of himself?

Mr. Moore. I will ask you, Mr. Bishop, what is the fact as to whether or not there is a uniform custom in San Francisco, and has been for twenty years last past, of allowing general agents of steamers and steamship companies, special compensation for their services rendered in connection with salvaging of vessels, and a commission of 2½ per cent upon moneys advanced by them, if the money belongs to the owners and 5 per cent in cases where the general agency contract specifies 5 per cent as the compensation therein mentioned in respect to freight earned?"

(Record, pp. 129-130.)

In addition to the assignments of error in respect to the sustaining of objections to the above questions to Mr. Bishop (Assignments 6-12, Record, pp. 230-232), the following offer of proof and errors were assigned in connection with this "Sinaloa" Salvage item:

"Q. Now, your charge in respect to the 'Sinaloa' salvage item is $3165.27, and I want to take that item up next.

Mr. Frank. We will have to object initially to anything at all with reference to salving the 'Sinaloa' because the 'Sinaloa' was one of the vessels in the employ of the steamship line, and he being in that employ at that time. it was a part of his duty as general agent to take care of the vessels.

The Court. I will tell you what I think would be the better way. I think you had best make to the Court a brief statement of the character of the evidence you propose to offer

in support of this item, and the Court will then pass upon that as a statement—I mean pass upon the question then as to whether or no under that statement it is within or outside the lines of his contract.

Mr. Moore. I propose to show that on June 14, 1917, the 'Sinaloa' ran aground in a fog a mile south of Cape Blanco, and that on June 15th Mr. Smith received a wire from the captain of the vessel to that effect; that on the same day he, Mr. Smith, started a tug from Coos Bay, which was expected to arrive at the place where the vessel was in four or five hours: that he was further wired by the captain that he must have assistance, the vessel was leaking badly, there was water in the afterhold, and that Mr. Smith left that same night for Cape Blanco with Captain Curtis of the Marine Underwriters, going overland to Eureka, and from there by boat north to the vessel at Cape Blanco; that before arriving he wired the captain he was sending men and cables and equipment; and that on July 11th, a barge was installed alongside the vessel and all of the gear was received; that he facilitated the saving of the ship; that he had a great deal of correspondence with the plaintiff in regard to her, and what should be done with respect to her, and in the adjustment upon her, and a great deal of correspondence with the people doing the salvaging operation; that the defendant insisted she be towed to San Francisco; and when there he submitted her to bids of the different shipbuilding companies; that there were three bids given for her repairs, the lowest being by the United Iron Works for $135,000.00, and the next lowest being $200,000.00; and that the United Iron Works did not want to do the job because they were immediately afterward commandeered by the Government;

and that Mr. Smith then took up the matter with the Shipping Board, and obtained a permit from the Shipping Board providing for the repairing of the vessel by the United Iron Works.

Mr. FRANK. I have nothing to say excepting that it is incompetent and immaterial, the statement he has made."

The defendant then offered to introduce certain cablegrams, stating:

"It is for purpose of showing services rendered by Mr. Smith in connection with the salvage of the 'Sinaloa' amounting to some $2000, which represents 5% of the sum total of $60,000 that was paid out. I want to state the purpose. That was advanced by Mr. Smith, and showing the communications between himself and Mr. Lindvig during the course of that time and the requests that were made upon him by Mr. Lindvig, in the matter and the appointment by Mr. Smith and the revocation of the appointment by Mr. Lindvig as to the appointments made by Smith."

(Record, pp. 104-106.)

(b) Assignments of error as to "Sinaloa" salvage item.

Assignment of Error No. 13:

In sustaining plaintiff's objection to the offer by defendant in evidence of the following items from the "Statement of General Average, case of the 'Sinaloa', June 15, 1917":

"$3,165.27 C. Henry Smith — Remuneration for handling a/c 5% Com. on $63,305.54	$ 3,165.27
"Provisions $38.07, General Average, 2826.95, Advances	274.90

"Vessel & Owners, $35.35.
$4,290.82. Disbursing the General Average:
With funds in hand 2½% on $8,552.19 213.80
Without funds in hand 5%, $81,540.32 4,077.02
As customary 4,290.82"

"$11,380.74 Interest on General Average Disbursements and allowances from date of outlay until probable date of settlement, $108,388.77 at 7% per annum $11,380.74"

(Record, pp. 232-233.)

Assignment of Error No. 14:

In sustaining plaintiff's objection to the offer in evidence by the defendant of the following cablegrams exchanged between the plaintiff and the defendant:

"June 16, 1916.

" 'Sinaloa' aground near Cape Blanco in fog this morning have sent tug for assistance.

Smith."

"June 17, 1916.

"Alta sailed for Melbourne stop Sinaloa position very difficult stop broadwide to the beach stop leaking stop ten feet water aft hold.

Smith."

"June 19, 1916.

"Wilcox Peck Hughes attending average Sinaloa.

Lindvig."

"June 20, 1916.

"Urgent Wilcox cable chance floating Sinaloa slight stop everything possible must be done to save her.

Lindvig."

"June 20, 1916.

"Kindly cable amount Sinaloa insured stop Smith now at ship stop after hold flooded no water forward stop discharging cargo onto barges.

Smith."

"June 22, 1916.

"Steamer Sinaloa insured as follows Seven hundred thousand kroners full three hundred thousand hull interest hundred thousand freight interest stop understand now prospects save ship stop condemnation must be avoided if by any means possible.

Lindvig."

"June 21, 1916.

"Sinaloa appointed Johnson and Higgins adjusters stop they are agents for Skuld.

Smith."

"June 23rd, 1916.

"Steamer Sinaloa you must adhere to my instructions appoint Wilcox Peck & Hughes who are agents main hull underwriters stop should otherwise have no objection employ Johnson Higgins.

Lindvig."

"June 23, 1916.

"Believe Sinaloa may be floated according to experts stop assembling fuel equipment to go north stop vessel in a rather protected position during summer.

Smith."

"June 29, 1916.

"Please insure ocean going barge sent to Sinaloa value fifteen thousand dollars.

Smith."

"July 2, 1916.

"Covered hull insurance barge fifteen thousand dollars two per cent voyage Frisco to steamer Sinaloa therefrom to Puget Sound or Frisco.

Lindvig."

"June 30, 1916.

"Please place insurance salvage equipment sent abroad Phoenix and ocean going barge to Sinaloa valued at twenty-five thousand dollars.

Smith."

"July 3, 1916.

"Steamer Sinaloa referring your cables 29/6 and 30/6 we have insured two barges and equipment in all 40,000 dollars value is this correct.

Lindvig."

(Record, pp. 233-235.)

Assignment of Error No. 15:

In sustaining plaintiff's objection to the following question propounded by the defendant to the witness C. Henry Smith:

"Q. I will ask you to state whether you arranged where the vessel should be brought to when she was taken away or when she was floated."

(Record, pp. 235-236.)

Assignment of Error No. 16:

In sustaining plaintiff's objection to the following question propounded by the defendant to the witness C. Henry Smith:

"Q. I will ask you to state whether or not you submitted the repairs of the vessel to different shipbuilding yards here in San Francisco on the lowest bid?"

(Record, p. 236.)

Assignment of Error No. 17:

In sustaining plaintiff's objection to the following question propounded by the defendant to the witness Wilfred Page:

"Q. What became of the different copies of bound volume entitled 'Statement of the General Average Case of the "Sinaloa", June 15, 1917', as they were made up, what disposition was made of them?"

(Record, p. 236.)

Assignment of Error No. 18:

In sustaining plaintiff's objection to the following question propounded by the defendant to the witness Wilfred Page:

"Q. I will ask you to state whether Mr. Lindvig ever thereafter or any member of his office, dissented from the item therein contained, the $3,165 allowed to Mr. Smith in connection with his services with respect to the salvaging of this vessel?"

(Record, p. 236.)

Assignment of Error No. 19:

In sustaining plaintiff's objection to the following question propounded by the defendant to the witness Wilfred Page:

"Q. Was there any contribution to be made by them (Dupont Company) to the general average?"

(Record, pp. 236-237.)

Assignment of Error No. 20:

In sustaining plaintiff's objection to the following question propounded by the defendant to the witness Wilfred Page:

"Q. So far as the cargo was concerned, do you know whether or not Mr. Lindvig has, in fact, collected from the cargo upon the basis of including in the general average this item of $3,165, allowed to Smith?"

(Record, p. 237.)

VI. COMMISSION DUPONT CONTRACT—$25,517.80.

(a) References to record relating to assignments of error.

For the return voyages of these vessels Mr. Smith entered into a yearly contract for the carriage of nitrate with the Dupont de Nemours Company. The last of these contracts entered into by Mr. Smith was dated July 10, 1917. This contract covered the carrying of 40,000 tons during the year June 1, 1917—June 1, 1918. Mr. Lindvig instructed Mr. Smith to first obtain the consent of the British Admiralty before entering into this contract and meantime not to fix for more than one voyage at a time, but Mr. Smith considered such a course impracticable and unnecessary, and therefore entered into the contract in his own name, and

so worded the contract as to permit the nitrate to be carried by steamers other than the "Baja California", "Sinaloa" and "Regulus". Afterward when Mr. Lindvig continued to object to the contract because the consent of the British Admiralty had not been obtained, Mr. Smith advised both Mr. Lindvig and the Dupont Company that he would carry out the contract himself if Mr. Lindvig did not care to do so. Mr. Smith also notified Mr. Lindvig that if he took over the nitrate contract it would be subject to Mr. Smith's 5 per cent commission (Record, pp. 110-111).

In his letter to plaintiff of October 6, 1917, defendant states:

> "I am personally responsible for this agreement made with the Dupont Company, and I shall carry it out myself, if you do not." (Record, p. 113.)

In writing to Mr. W. A. Simonton, traffic manager of the Dupont Company, on October 5, 1917, defendant stated:

> "If any trouble should be made, however, I can get the necessary tonnage in 60 or 90 days or even earlier." (Record, p. 113.)

The contract was actually taken over and carried out by Mr. Lindvig.

(b) Assignments of error as to commission on Dupont contract.

Assignment of Error No. 33:

In refusing to give instruction No. 9, requested by the defendant, and reading:

"If you find that defendant has performed on his part all the acts necessary to the accomplishment of a particular result, such as the freighting of 40,000 tons, 10% more or less, of cargo in plaintiff's vessels, for and on behalf of the du Pont de Nemours Powder Company, defendant cannot be deprived of his right to the entire compensation by the refusal or neglect of the plaintiff to thereafter perform the necessary acts on his part, whereby the contemplated result is defeated or only partly executed."

(Record, p. 240.)

Assignment of Error No. 34:

In refusing to give instruction No. 10, requested by the defendant, and reading:

"The failure, refusal or inability of plaintiff to carry out the complete contract for the transportation of 40,000 tons, 10% more or less, of cargo for the du Pont de Nemours Powder Company does not defeat defendant's right to full compensation for negotiating this contract, nor is this right defeated by the fact, if it be a fact, that plaintiff and the du Pont de Nemours Powder Company subsequently modified, rescinded or cancelled the contract or a part thereof by mutual consent."

(Record, p. 240.)

Assignment of Error No. 35:

In refusing to give instruction No. 11, requested by the defendant, and reading:

"If you find that plaintiff carried out or offered to perform the agreement with du Pont

de Nemours Powder Company, or a part of said agreement, with knowledge of the whole agreement, I instruct you that such conduct on the part of plaintiff constitutes a ratification of the whole agreement, and that defendant is entitled to compensation for procuring the said agreement."

(Record, p. 241.)

Assignment of Error No. 36:

In refusing to give instruction No. 27, requested by the defendant, and reading:

"I instruct you that, under the contract of June 29, 1914, the defendant is entitled to a reasonable commission on the freight earned by the steamers of the Baja California Company in performing the contract with the du Pont de Nemours Powder Company for the transportation from the Republic of Chile, to San Francisco, California, and elsewhere, of 40,000 tons, 10% more or less, of nitrate."

(Record, p. 241.)

Assignment of Error No. 43:

In refusing to give instruction No. 13, requested by the defendant, and reading:

"If you find that defendant was to receive a commission for contracts made for the benefit of plaintiff and that, during the term of his agency, he procured contracts for the benefit of plaintiff, I instruct you that defendant is entitled to commissions not merely on the contracts which were performed before the termination of the defendant's agency, but that defendant is also entitled to commissions on all contracts secured by him, and performed, or to

be performed, by plaintiff subsequent to the termination of defendant's agency."

(Record, p. 244.)

VII. BALANCE ESTIMATED FREIGHT EARNINGS—$5000.

(a) Reference to record in connection with assignments of error.

This item relates to cargo booked prior to October 1, 1917, but not actually loaded on board until after October 1st.

(Record, p. 119.)

The agency terminated upon October 1st, but it is the defendant's contention that the commission on the freight above mentioned was "earned" as of October 1st.

(b) Assignments of error as to commission on freight booked prior to October 1st.

Assignment of Error No. 43:

In refusing to give instruction No. 13, requested by the defendant, and reading:

> "If you find that defendant was to receive a commission for contracts made for the benefit of plaintiff and that, during the term of his agency, he procured contracts for the benefit of plaintiff, I instruct you that defendant is entitled to commissions not merely on the contracts which were performed before the termination of the defendant's agency, but that defendant is also entitled to commissions on all contracts secured by him, and performed,

or to be performed, by plaintiff subsequent to the termination of defendant's agency."

(Record, p. 244.)

Assignment of Error No. 44:

In refusing to give instruction No. 20, requested by the defendant, and reading:

"As to the item of $2049.65 as defendant's commission on the inward freight of the 'Governor Forbes', I charge you as a matter of law that your verdict should be in favor of the defendant."

(Record, p. 245.)

VIII. COMMISSION ON INWARD FREIGHT "GOVERNOR FORBES"—$2049.65.

(a) Reference to record in connection with assignments of error.

This item relates to the inward freight of the "Governor Forbes" on her voyage arriving here on October 3 or 4, 1917 (Record, p. 123). She left Guayaquil in September, 1917, with a cargo of cocoa, and the $2,049.65 is 5 per cent of the freight money paid for carrying the cocoa.

(b) Assignments of error as to commission on inward freight "Governor Forbes".

Assignment of Error No. 43:

In refusing to give instruction No. 13, requested by the defendant, and reading:

"If you find that defendant was to receive a commission for contracts made for the benefit of plaintiff, and that, during the term of his agency, he procured contracts for the benefit of plaintiff, I instruct you that defendant is entitled to commissions not merely on the contracts which were performed before the termination of the defendant's agency, but the defendant is also entitled to commissions on all contracts secured by him, and performed, or to be performed, by plaintiff subsequent to the termination of defendant's agency."

(Record, p. 244.)

Assignment of Error No. 44:

In refusing to give instruction No. 20, requested by the defendant, and reading:

"As to the item of $2049.65 as defendant's commission on the inward freight of the 'Governor Forbes', I charge you as a matter of law that your verdict should be in favor of the defendant."

(Record, p. 245.)